Opinion No. 2013-109

September 13, 2013

Lieutenant Colonel Marjorie LeClair, USA, Ret.
3362 Burnt Ridge Road
Shirley, Arkansas 72153-8329

Dear Lieutenant Colonel LeClair:

This is in response to your request for certification, pursuant to A.C.A. § 7-9-107 (Repl. 2007), of the following popular name and ballot title for a proposed constitutional amendment. You have previously submitted similar measures, which this office rejected due to ambiguities in the texts of the proposed measures. *See* Op. Att'y Gen. Nos. 2013-094 and 2013-061. You have made changes in the text of your proposal since your last submission and have now submitted the following proposed popular name and ballot title for my certification:

Popular Name

BAN PROHIBITION OF CANNABIS

Ballot Title

> Amend the Constitution of Arkansas to repeal all Arkansas laws pertaining to the cannabis plant. This amendment does not change any federal laws that may exist regarding the cannabis plant.

The Attorney General is required, pursuant to A.C.A. § 7-9-107, to certify the popular name and ballot title of all proposed initiative and referendum acts or amendments before the petitions are circulated for signature. The law provides that the Attorney General may substitute and certify a more suitable and correct popular name and ballot title, if he can do so, or if the proposed popular name and ballot title are sufficiently misleading, may reject the entire petition. **Neither**

certification nor rejection of a popular name and ballot title reflects my view of the merits of the proposal. This Office has been given no authority to consider the merits of any measure.

In this regard, A.C.A. § 7-9-107 neither requires nor authorizes this office to make legal determinations concerning the merits of the act or amendment, or concerning the likelihood that it will accomplish its stated objective. In addition, consistent with Arkansas Supreme Court precedent, unless the measure is "clearly contrary to law,"[1] this office will not require that a measure's proponents acknowledge in the ballot title any possible constitutional infirmities. As part of my review, however, I may address constitutional concerns for consideration by the measure's proponents.

Consequently, this review has been limited primarily to a determination, pursuant to the guidelines that have been set forth by the Arkansas Supreme Court, discussed below, of whether the popular name and ballot title you have submitted accurately and impartially summarize the provisions of your proposed amendment.

The purpose of my review and certification is to ensure that the popular name and ballot title honestly, intelligibly, and fairly set forth the purpose of the proposed amendment or act.[2]

The popular name is primarily a useful legislative device.[3] It need not contain detailed information or include exceptions that might be required of a ballot title, but it must not be misleading or give partisan coloring to the merit of the proposal.[4] The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency.[5]

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[1] *See Kurrus v. Priest,* 342 Ark. 434, 445, 29 S.W.3d 669, 675 (2000); *Donovan v. Priest,* 326 Ark. 353, 359, 931 S.W.2d 119, 121 (1996); *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992).

[2] *See Arkansas Women's Political Caucus v. Riviere*, 283 Ark. 463, 466, 677 S.W.2d 846 (1984).

[3] *Pafford v. Hall*, 217 Ark. 734, 739, 233 S.W.2d 72, 75 (1950).

[4] *E.g., Chaney v. Bryant*, 259 Ark. 294, 297, 532 S.W.2d 741, 743 (1976). ; *Moore v. Hall*, 229 Ark. 411, 316 S.W.2d 207 (1958).

[5] *May v. Daniels,* 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

The ballot title must include an impartial summary of the proposed amendment or act that will give the voter a fair understanding of the issues presented.[6] According to the court, if information omitted from the ballot title is an "essential fact which would give the voter serious ground for reflection, it must be disclosed."[7] At the same time, however, a ballot title must be brief and concise (*see* A.C.A. § 7-9-107(b)); otherwise voters could run afoul of A.C.A. § 7-5-522's five minute limit in voting booths when other voters are waiting in line.[8] The ballot title is not required to be perfect, nor is it reasonable to expect the title to cover or anticipate every possible legal argument the proposed measure might evoke.[9] The title, however, must be free from any misleading tendency, whether by amplification, omission, or fallacy; it must not be tinged with partisan coloring.[10] The ballot title must be honest and impartial,[11] and it must convey an intelligible idea of the scope and significance of a proposed change in the law.[12]

Furthermore, the Court has recently confirmed that a proposed amendment cannot be approved if "[t]he text of the proposed amendment itself contribute[s] to the confusion and disconnect between the language in the popular name and the ballot title and the language in the proposed measure."[13] The Court concluded: "[I]nternal inconsistencies would inevitably lead to confusion in drafting a popular name and ballot title and to confusion in the ballot title itself."[14] Where the effects of a proposed measure on current law are unclear or ambiguous, it is impossible for me to perform my statutory duty to the satisfaction of the Arkansas Supreme Court without clarification of the ambiguities.

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[6] *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980).

[7] *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994).

[8] *Id.* at 288, 884 S.W.2d at 944.

[9] *Id.* 293, 884 S.W.2d at 946–47.

[10] *Id.* at 284, 884 S.W.2d at 942.

[11] *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

[12] *Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 245, 884 S.W.2d 605, 607 (1994) (internal quotations omitted).

[13] *Roberts v. Priest*, 341 Ark. 813, 20 S.W.3d 376 (2000).

[14] *Id.*

Having analyzed your proposed amendment, as well as your proposed popular name and ballot title under the above precepts, it is my conclusion that I must reject your proposed popular name and ballot title due to ambiguities in the *text* of your proposed measure. A number of additions or changes to your ballot title are, in my view, necessary in order to more fully and correctly summarize your proposal. I cannot, however, at this time, fairly or completely summarize the effect of your proposed measure to the electorate in a popular name or ballot title without the resolution of the ambiguities. I am therefore unable to substitute and certify a more suitable and correct popular name and ballot title pursuant to A.C.A. § 7-9-107(b).

The text of your measure in its entirety provides as follows:

> Repealing the Arkansas cannabis laws would enable farmers to legally apply for a federal permit to grow cannabis as a farm commodity. Presently cannabis derived products are imported while Arkansas farmers are denied the right to grow cannabis crops. This is a disadvantage to Arkansas farmers.
>
> Repealing Arkansas Cannabis laws allows those using cannabis for symptomatic relief of illness to do so without fear of arrest by state or local enforcement. Federal law presently classifies Cannabis as a Scheduled [sic] I control drug.
>
> Repealing Arkansas Cannabis laws impacts the state's economy positively by diverting tax dollars from the process of incarcerating those convicted of cannabis crimes.

This measure is ambiguous in the following respects, which track the problems I noted in my response to your immediately previous submission:

1. As a general matter, these three provisions do no more than state objectives to be realized by presumably undertaking some practical action. You recite this action in your ballot title – namely, "repeal[ing] all Arkansas laws pertaining to the cannabis plant" – but never declare or direct the repeal in the text of your measure itself. As a result, rather than summarizing your measure, your ballot title impermissibly adds substantive provisions thereto. As I have previously noted on several occasions:

> The text of a proposed constitutional amendment, if adopted, becomes a part of the Arkansas Constitution. Ideally it consists of clear, complete sentences that actively dictate the legal effects desired by the sponsors. A ballot title, on the other hand, is an impartial, concise summary of the proposed amendment. As a consequence, it usually consists of a series of short descriptive phrases or clauses, which refer to, summarize and delineate the various important provisions of the amendment. The format and wording of these summary phrases or clauses, however, do not ordinarily direct action or actively bring about changes in the law.[15]

The text of a measure, in short, actually sets forth and effects changes in the law.[16] The ballot title, by contrast, merely summarizes what the measure in itself has directed. Your measure contains no operative language of the sort required in the text of a measure, instead merely reciting various objectives to be realized by changes you have failed to recite. I am consequently unable to summarize in the ballot title the practical action you apparently contemplate.

2. Your current submission, like its predecessor, represents that repealing Arkansas cannabis laws would restore to Arkansas farmers the right to grow cannabis. As I noted in response to your previous submission, cannabis in any of its cultivar forms is classified as a Schedule I drug under the federal Controlled Substance Act,[17] and it is accordingly subject to federal law that conflicts with and supersedes contrary state laws.[18] This fact

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[15] Ops. Att'y Gen. 2013-089 and 2007-083.

[16] This office has explored the significance of this distinction on at least two occasions. *See* Ops. Att'y Gen. 2013-089 and 2007-083.

[17] 21 U.S.C.A. §§ 801 *et seq.*

[18] In offering this conclusion, I am not ignoring the recent United States Department of Justice Memorandum for United States Attorneys, dated August 29, 2013, entitled *Guidance Regarding Marijuana Enforcement*, http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf (last visited 8/30/

suggests that the repeal of Arkansas cannabis laws would not have the effect you propose on the ability of Arkansans legally to cultivate marijuana.

If the text of a measure *inaccurately* asserts that the amendment will realize certain specified goals, any such inaccurate assertion will in itself render the text ambiguous and insusceptible of summation in a ballot title. I am consequently foreclosed from summarizing the measure in a way that adequately informs the voters of legal consequences whose disclosure might prompt serious concern in a reasonable voter.

3. The first sentence of your measure's second paragraph declares that "[r]epealing Arkansas Cannabis laws allows those using cannabis for symptomatic relief of illness to do so without fear of arrest by state or local enforcement." This sentence is confusing in that it is unclear why you here mention as excluded from state or local prosecution only the *medical* use of marijuana, without referring to industrial or recreational uses. Presumably, striking all state laws relating to cannabis would enable individuals, "without fear of arrest by state or local enforcement," to put

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13). In this memorandum, the DOJ advises federal prosecutors to forebear prosecuting individuals for violations of the federal Controlled Substances Act if state law permitted the conduct and specified federal priorities were not compromised thereby. This memorandum, however, does no more than offer advice to prosecutors in the exercise of what remains their discretion, and, as reflected in the following, it in no way undermines the preemptive effect of federal law:

> This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. . . .

Id. A discretionary decision to suspend the enforcement of federal law is not the equivalent of a concession that state laws can be declared valid in the face of conflicting, preemptive federal law.

See, e.g., University of Kentucky College of Agriculture Cooperative Extension Service, *Industrial Hemp*, www.uky.edu/Ag/CDBREC/introsheets/hemp.pdf (last visited 8/13/13). This article reviews the provisions of 2013 legislation, codified at Kan. Rev. Stat. §§ 260.850 through 260.869, in relation to federal law regulating cannabis. The article concludes:

> While the passage of SB50 paves the way for industrial hemp production at the state level, it is still illegal to grow this crop without a permit issued by the federal government. Currently strict federal regulations and the high cost of complying with DEA security requirements make hemp production prohibitive, even at the research level.

> cannabis to *any* use they chose that was not barred under state or local law for some unrelated reason. The fact that you have focused only on one use as exempt from prosecution raises the question whether other uses would be likewise exempt. Without resolution of this ambiguity, I am unable to summarize your measure in a ballot title.

I cannot begin to certify a ballot title for your proposed amendment in the face of the ambiguities noted above. You must remedy these confusing and ambiguous points before I can perform my statutory duty. As I have previously noted in issuing a similar rejection:

> "I must . . . return your submission and instruct you to finalize the language of your proposed amendment, perhaps with the guidance of private counsel or experts of your choosing to ensure that there are no ambiguities or problems of implementation. ***Amending the Arkansas Constitution is a matter of the utmost seriousness, and the Arkansas Supreme Court holds popular names and ballot titles of proposed amendments to a standard that is commensurate with this seriousness.*** The standard cannot be met, however, if the text of the measure is unclear or uncertainties remain. That is why I suggest that you seek assistance in evaluating your text, bearing in mind that my ability to certify a popular name and ballot title depends upon the clarity of the language of the amendment."[19]

My office, in the certification of ballot titles and popular names, does not concern itself with the merits, philosophy, or ideology of proposed measures. I have no constitutional role in the shaping or drafting of such measures. My statutory mandate is embodied only in A.C.A. § 7-9-107 and my duty is to the electorate. I am not your counsel in this matter and cannot advise you as to the substance of your proposal.

My statutory duty, under these circumstances, is to reject your proposed ballot title, stating my reasons therefor, and to instruct you to "redesign" the proposed measure and ballot title.[20] You may, after clarification of the matters discussed

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[19] Op. Att'y Gen. 2007-183, quoting Op. Att'y Gen. 2003-127 (emphasis added in 2007 opinion).

[20] *See* A.C.A. § 7-9-107(c).

above, resubmit your proposed amendment, along with a proposed popular name and ballot title, at your convenience. I anticipate, as noted above, that some changes or additions to your submitted popular name and ballot title may be necessary. I will be pleased to perform my statutory duties in this regard in a timely manner after resubmission.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/cyh

Enclosure

Cheryl Hall

From: Marjorie LeClair <MarjorieLeclair2@mail.com>
Sent: Thursday, August 29, 2013 4:02 PM
To: Cheryl Hall
Subject: Resubmital of amendment

Importance: High

Dear Ms Hall;

Please find below a re-submital of the amendment.

Sincerely,
Marjorie LeClair
3362 Burnt Ridge Road
Shirley, Ar. 72153

Ban Prohibition of Cannabis

Title

Amend the Constitution of Arkansas to repeal all Arkansas laws pertaining to the cannabis plant. This amendment does not change any federal laws that may exist regarding the cannabis plant.

Text

Repealing the Arkansas cannabis laws would enable farmers to legally apply for a federal permit to grow cannabis as a farm commodity. Presently cannabis derived products are imported while Arkansas farmers are denied the right to grow cannabis crops. This is a disadvantage to Arkansas farmers.

Repealing Arkansas Cannabis laws allows those using cannabis for symptomatic relief of illness to do so without fear of arrest by state or local enforcement. Federal law presently classifies Cannabis as a Scheduled I control drug.

Repealing Arkansas Cannabis laws impacts the state's economy positively by diverting tax dollars from the process of incarcerating those convicted of cannabis crimes.